No. 09-1342

In The

Supreme Court of the United States

JERI-ANN SHERRY

Petitioner,

v.

WILLIAM D. JOHNSON

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF

Michael A. Cox
Attorney General

B. Eric Restuccia
Michigan Solicitor General
Counsel of Record
P. O. Box 30212
Lansing, Michigan 48909
restucciae@michigan.gov
(517) 373-1124

Joel D. McGormley
Division Chief of Appellate

Brad H. Beaver
Habeas Section Head

Attorneys for Petitioner

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INTRODUCTION

As noted in the original petition, the defense counsel here agreed to the closure of the courtroom for three frightened witnesses where two other witnesses had been murdered during the pendency of the case. The U.S. Court of Appeals for the Sixth Circuit determined that prejudice is presumed under *Waller v. Georgia* if the State trial court would not have closed the courtroom in the absence of the agreement of William Johnson's counsel.

But this case came to the Sixth Circuit in habeas corpus review. And there is no clearly established Supreme Court precedent that the courts should presume prejudice for ineffective assistance of counsel for agreeing to the courtroom's closure, a structural error if the courtroom was improperly closed. Thus, the State court decision to reject Johnson's ineffective assistance of counsel claim was not objectively unreasonable under 28 U.S.C. § 2254(d).

The primary error of Johnson's brief in opposition is failing to recognize that this Court has not previously addressed this issue. Rather, examined as a defaulted claim of structural error, this Court rejected a claim for relief in *Francis v. Henderson*. Moreover, this Court did not list structural error as one of the excuses for a habeas petitioner to avoid having to prove cause and prejudice in *Coleman v. Thompson*. Consequently, it is an open question in this Court whether the action of agreeing to or failing to object to the closure – if ineffective assistance – would require the presumption of prejudice. In fact, there is good basis on which to apply the prejudice prong of *Strickland v. Washington*. Otherwise, as several courts

have noted, a defense counsel may embed structural error in the trial as an appellate parachute.

The other significant error of Johnson's brief in opposition is in its effort to reconcile this decision and *Owens v. United States* from the First Circuit with *Purvis v. Crosby* from the Eleventh Circuit. Johnson contends that *Purvis* is distinguishable because it examined a partial closure, not a total one as here. But the Eleventh Circuit in *Purvis* predicated its analysis on the allegation of error being structural in nature. Also, other circuits have noted the same point about the requirement of proving cause and prejudice to overcome a procedural default even where the defaulted error was a structural one. These decisions are in conflict with the one here.

The final error of Johnson's brief is his factual claim that one of the persons murdered – Elvin Robinson – was not a witness in this case. Johnson's claim is contradicted by the record and the decisions of all of the lower courts. Without contradiction, the prosecution noted that Robinson was a witness "at the scene" who was later murdered. Johnson has not overcome the presumed correctness of this fact.

ARGUMENT

I. There is no clearly established Supreme Court precedent that requires a court to presume prejudice for an allegation of deficient performance in agreeing to close the courtroom.

This Court has not resolved the question about whether an attorney's deficient performance for a claim about one's right to a public trial under the Sixth Amendment excuses a criminal defendant's burden of proving prejudice. This is true whether the issue is examined as one in a habeas corpus proceeding in attempting to avoid a procedural default by demonstrating cause and prejudice or examined as one in which a criminal defendant must prove prejudice under *Strickland v. Washington* on direct review.[1] This is a significant legal issue.

The Sixth Circuit decision here examined the issue both as one of a procedural default and as a question whether proof of ineffective assistance required an independent showing of prejudice. In resolving these two points, the Sixth Circuit determined that "if the closure were unjustified or broader than necessary, prejudice would be presumed." Pet. App. 17a-18a. Thus, the Sixth Circuit determined that there is no necessary showing of prejudice for a procedural default and for ineffective assistance where the underlying error is a structural error (agreeing to the closure of the courtroom).

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[1] *Strickland v. Washington*, 466 U.S. 668 (1984).

A. This Court has not previously required the presumption of prejudice where there was ineffective assistance or the claim was defaulted.

Johnson's claim in his brief in opposition that clearly established Supreme Court precedent supports his position (p. 14) is insensitive to the posture of the case. This Court in *Waller* has recognized that a preserved claim of a violation of the right to public trial under the Sixth Amendment would not require a showing of prejudice as a structural error.[2] But there was no objection to the closure of the courtroom here. Rather, as even the Sixth Circuit conceded, Johnson's counsel agreed ("acquiesc[ed]") to the closure of the courtroom. Pet. App. 16a. This Court has not resolved whether such a claim of error – where the claim was waived by counsel – would allow for the presumption of prejudice to excuse the procedural bar or to establish ineffective assistance of counsel.

Johnson asserts that this Court has recognized an exception to the *Strickland* prejudice requirement. In *Mickens v. Taylor*, however, this Court noted that "defects in assistance that have no probable effect upon the trial's outcome do not establish a constitutional violation."[3] As a general matter, a defendant alleging a

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[2] *Waller v. Georgia*, 467 U.S. 39, 49 (1984). This Court did note that under the First Amendment "[t]he public has a right to be present whether or not any party has asserted the right." *Presley v. Georgia*, 558 U.S. ___; 130 S. Ct. 721, 724-725 (2010), citing *Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501, 503-504 (1984).

[3] *Mickens v. Taylor*, 535 U.S. 162, 166-167 (2002) (citation and internal quotes omitted).

Sixth Amendment violation must demonstrate a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Mickens* recognized only two exceptions to the requirement that prejudice be shown: (1) where assistance of counsel has been denied entirely or during a critical stage of the proceedings, and (2) when the defendant's attorney actively represented conflicting interests. The Court has never presumed *Strickland* prejudice in any other circumstance. By creating a third category of *Strickland* claims where prejudice is presumed – where counsel fails to object to a structural error – the Sixth Circuit created a new constitutional rule instead of confining itself to clearly established Supreme Court law as required by § 2254(d).

The only case in which this Court has addressed the issue whether a structural error nevertheless requires proof of prejudice was in *Francis v. Henderson*.[4] In *Francis*, the claim of error related to an attorney's failure to object to a process by which African American jurors were excluded from the grand jury. This Court determined that to avoid the application of a default in habeas, the criminal defendant would have to prove "actual prejudice."[5]

In response, Johnson notes in his brief in opposition (p. 15) that the *Francis* decision, and the decision on which it relied, *Davis v. United States*,[6] both preceded this Court's ruling in *Rose v. Mitchell* in

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[4] *Francis v. Henderson*, 425 U.S. 536 (1976).

[5] *Francis*, 425 U.S. at 542.

[6] *Davis v. United States*, 411 U.S. 233 (1973).

which this Court rejected the claim that "habeas corpus relief should be granted only where the error alleged in support of that relief affected the determination of guilt."[7]

The decision in *Rose*, however, only reaffirmed a long standing position from this Court that a conviction could not stand where there was discrimination in the process of selecting the grand jury. In *Vasquez v. Hillery*, this Court indicated that in rejecting harmless-error analysis, the Court was only refusing to "reconsider[]" this line of precedent:

> [T]he Court has repeatedly rejected all arguments that conviction may stand despite racial discrimination in the selection of the grand jury. *See, e. g.*, [list of cases]. Only six years ago, the Court explicitly addressed the question whether this unbroken line of case law should be *reconsidered* in favor of a harmless-error standard, and determined that it should not. *Rose v. Mitchell*, 443 U.S. 545 (1979).[8]

The suggestion, therefore, is that the rule was already in place at the time of the decision in *Francis*.

Furthermore, the subsequent decision in *Rose* does not affect the status of *Francis* because this Court expressly distinguished it, noting that there was no claim in *Rose* that the claim was procedurally

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[7] *Rose v. Mitchell*, 443 U.S. 545, 560 (1979).

[8] *Vasquez v. Hillery*, 474 U.S. 254, 261 (1986) (emphasis added).

defaulted.[9] If anything, the Court's analysis reaffirms the holding in *Francis*. The only logical inference available here is that *Francis* remains good law and that a defaulted claim would still require the habeas petitioner to prove prejudice to overcome the default as in *Francis*.

This Court's later decision in *Coleman v. Thompson* further supports the conclusion that a structural error does not excuse the burden of proving prejudice to avoid a procedural default.[10] In *Coleman*, this Court expressly stated that where a claim was procedurally defaulted in state court, a habeas petitioner was required to prove cause and prejudice to overcome this default.[11] The only exception identified by this Court was for a "fundamental miscarriage of justice" in which the conviction has probably resulted in a conviction of an actually innocent person.[12] There was no exception included for structural errors. Several circuits have noted this very point in determining that a defaulted claim that is predicated on an allegation of a structural error does not alleviate the habeas petitioner's burden of proving prejudice.[13]

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[9] *Rose*, 443 U.S. at 559 n. 8.

[10] *Coleman v. Thompson*, 501 U.S. 722 (1991).

[11] *Coleman*, 501 U.S. at 750.

[12] *Coleman*, 501 U.S. at 750.

[13] *See, e.g., Ward v. Hinsley*, 377 F.3d 719, 725 (7th Cir. 2004); *Hatcher v. Hopkins*, 256 F.3d 761, 764 (8th Cir. 2001).

B. There is a good basis on which to require a criminal defendant to prove prejudice for the error at issue here.

This Court has stated that a criminal defendant may in some circumstances waive his right to a public trial.[14] This would be a strange rule if a criminal defendant in that circumstance could then on appeal allege ineffective assistance of counsel for that waiver and ensure a new trial because prejudice would be presumed from that allegation of error.

Indeed, this Court has addressed on direct review a claim of a violation of a right to a public trial where there was no objection. In *Levine v. United States*, a criminal defendant was testifying at a grand jury proceeding and refused to testify even after the courtroom had been cleared.[15] The trial court then held the defendant in criminal contempt and sentenced him to one year in prison – when the public was not present. This Court held that the criminal defendant could not then complain on appeal for the first time:

> Due regard generally for the public nature of the judicial process does not require disregard of the solid demands of the fair administration of justice in favor of a party who, at the appropriate time and acting under advice of counsel, saw no disregard of a right, but raises an

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[14] *Singer v. United States*, 380 U.S. 24, 35 (1965).

[15] *Levine v. United States*, 362 U.S. 610, 619 (1960).

> abstract claim only as an afterthought on appeal.[16]

As noted by one of the lower courts, the Court treated the failure to object here as a waiver of the claim.[17]

One of the main reasons that requiring proof of prejudice makes sense is that it forecloses gamesmanship. This was the reason that the Utah Supreme Court determined that the excusal of the burden of proving prejudice would create an incentive for a defense counsel to embed error in the trial:

> We decline to do away with the requirement of a showing of prejudice for an ineffective assistance of counsel claim. Were we to hold otherwise, defense counsel could freely refrain from objecting to an improper closure order and then, if the verdict is adverse, raise the issue on appeal for the first time under the rubric of an ineffective assistance of counsel claim. Absent a prejudice requirement, a retrial would be automatic. We decline to adopt a rule that would encourage such manipulation.[18]

The Seventh Circuit identified similar concerns – characterizing it as "sandbagging" – in addressing the same point in the habeas context for proof of cause and prejudice.[19]

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[16] *Levine*, 362 U.S. at 619-620.

[17] *See United States v. Hitt*, 473 F.3d 146, 155 (5th Cir. 2006).

[18] *Utah v. Butterfield*, 784 P.2d 153, 157 (Utah 1989).

[19] *Ward*, 377 F.3d at 726.

II. There is a conflict of circuits on this issue.

Johnson argues that there is no conflict between the circuits, because the case relied on by the State, *Purvis v. Crosby*, only involved a partial closure of the courtroom.[20] As noted in the petition (p. 21), however, the Court predicated its analysis on the assumption that the error was a structural one.[21] The issue was squarely framed as here:

> If a partial closure of the courtroom like this is a structural error or defect--*and we are assuming for this discussion that it is*--the question is whether a habeas petitioner must show prejudice in order to prevail on a claim that his trial counsel was ineffective for failing to object to the closure.[22]

The issue was framed the same way in this case.

Moreover, the decision here also conflicts with the two circuits that reasoned it would be necessary to prove cause and prejudice to overcome a procedural default even where that error that related to a structural error.

In *Ward v. Hinsley*, the Seventh Circuit held that a claim was barred by procedural default even where the error was alleged to rise to the level of a structural error.[23] The Seventh Circuit reasoned that

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[20] *Purvis v. Crosby*, 451 F.3d 734 (11th Cir. 2006).

[21] *Purvis*, 451 F.3d at 740.

[22] *Purvis*, 451 F.3d at 740.

[23] *Ward*, 377 F.3d at 726.

the considerations of comity and federalism require the application of the procedural default doctrine. [24] The claim by Johnson was procedurally defaulted here, and the Sixth Circuit examined the ineffective assistance of counsel claim together with the issue whether cause and prejudice excused the default. Pet. App. 13a-14a.

Likewise, in *Hatcher v. Hopkins*, the Eighth Circuit determined that there is no case law that excuses a procedural default for a claim of a structural error. The circuit rejected the habeas petitioner's reliance on *Arizona v. Fulminante*, stating that it was "incorrect" that "federal courts may review structural errors even though they have been procedurally defaulted in the state courts."[25]

The case from the Second Circuit relied on by Johnson, *Carson v. Fischer*, further confirms the split. In *Carson*, the Second Circuit held that a habeas petitioner was not required to prove harmless error under *Strickland* where a family member or a friend had been excluded from the courtroom.[26] Significantly, in *Rodriguez v. Miller* in which the Sixth Amendment right to a public trial was at issue in habeas, the Second Circuit stated that it could no longer rely on *Carson*.[27] This Court had vacated and remanded *Rodriguez* in light of its decision in *Musladin v. Carey*.[28]

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[24] *Ward*, 377 F.3d at 726 (citations omitted).

[25] *Hatcher*, 256 F.3d at 764, citing *Arizona v. Fulminante*, 499 U.S. 279 (1991).

[26] *Carson v. Fischer*, 421 F.3d 83, 95 (2d Cir. 2005).

[27] *See Rodriguez v. Miller*, 537 F.3d 102, 109 (2d Cir. 2007).

[28] *Rodriguez*, 537 F.3d at 109, on remand in light of *Casey v. Musladin*, 549 U.S. 70 (2006).

III. Johnson's assertion that Elvin Robinson was not a witness in this case is belied by the record.

In his brief in opposition (pp. 8-13), Johnson addresses whether the courtroom closure was proper under *Waller*, an issue not implicated by the petition's question. In this analysis, however, Johnson asserts that Robinson – who was murdered during the pendency of the case against Johnson – was not a witness in the Johnson case. This is wrong. The prosecution stated this point in its motion to close the courtroom, this point was accepted in the State courts, and was accepted below. The fact that Robinson was a witness here was well established and has not been rebutted. See 28 U.S.C. § 2254(e)(1).

As noted in the petition, the prosecution moved to close the courtroom because two witnesses had been murdered during the pendency of the case. The prosecution identified Robinson as a witness on the "scene" in this case. Res. App. 54a. Johnson contends that Robinson was a victim to a different crime (p. 9), but this was a related case from the same set of circumstances. The same indictment charged Johnson's codefendant with the crime of assault with intent to murder against Robinson. Trial, Vol. III, pp. 6-8.

In its order denying Johnson's motion for a new trial, the State trial court noted that "[j]ust prior to the trial two key prosecution witnesses had been murdered." Order denying motion for new trial, September 30, 2003, p. 1. The Michigan Court of Appeals likewise found that "two other witnesses had been killed under suspicious circumstances." Pet. App.

71a. These findings are presumptively correct. The federal lower courts likewise did not dispute these points. Pet. App. 10a ("the prosecutor had informed the court that two witnesses had been killed"); Pet. App. 43a (referring to "suspicious deaths of two witnesses").

The suggestion that the fear here was not substantial is belied by the record. The prosecution noted that these murders had frightened the other witnesses and compromised the ability of the prosecution to bring its witnesses to trial:

> There are three or four witnesses who refused to come to court because they don't want their face to be seen. [Res. App. 56a-57a.]

The Sixth Circuit did not fully appreciate the significance of the danger to the witnesses in stating that "we are far from convinced that this was the 'rare' circumstance where closure was justified." Pet. App. 15a.

CONCLUSION

The State of Michigan respectfully requests that this Honorable Court grant the writ of certiorari.

Respectfully submitted,

Michael A. Cox
Attorney General

B. Eric Restuccia
Michigan Solicitor General
Counsel of Record
P. O. Box 30212
Lansing, Michigan 48909
restucciae@michigan.gov
(517) 373-1124

Joel D. McGormley
Division Chief of Appellate

Brad H. Beaver
Habeas Section Head

Attorneys for Petitioner

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